91-1636

No.

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANK RENFROE,
PETITIONER,

vs.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

— AND APPENDIX —

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QUESTIONS PRESENTED

I. WHERE THERE WAS A GREAT DISPARITY IN THE EVIDENCE AGAINST A CODEFENDANT, ANTAGONISTIC DEFENSES AND PROSECUTOR ARGUMENT INVITING CONSIDERATION OF EVIDENCE IRRELEVANT TO FRANK RENFROE WAS A SEPARATE TRIAL REQUIRED?

II. WHERE THE FBI AGENT WHO MADE THE BUYS ALLEGED IN THIS CASE WAS ALLOWED TO GIVE HIS OPINION ON GUILT AS WELL AS LENGTHY CONCLUSIONS ABOUT THE MEANING OF EVIDENCE IS A NEW TRIAL REQUIRED?

III. WHERE THE PROSECUTOR'S IMPROPER COMMENTS DISPARAGED THE DEFENSE AND DEPICTED DEFENDANT AS A BAD MAN, WAS DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW VIOLATED?

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PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding before the United States Court of Apeals were as follows:

1. United States of America - Plaintiff-Appellee;

2. Frank Renfroe - Defendant-Appellant;

3. Wendell Daniels - Defendant-Appellant;

4. Odolph Daniels - Defendant-Appellant.

CONSTITUTIONAL PROVISION

The Fifth Amendment provides in pertinent part:

> No person shall be...deprived of life, liberty, or property without due process of law.

NO._____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1991

FRANK RENFROE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, **FRANK RENFROE**, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on December 26, 1991.

OPINION BELOW

The opinion of the Court of Appeals (App. 1) is not reported. (Sixth Cir. No. 90-2018)

JURISDICTION

The judgment of the Court of Appeals was entered on December 26, 1991. This petition is being filed within ninety (90) days of that date as required by Supreme Court Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

1. Defendant-Appellant Frank Renfroe was one of four defendants named in a four count indictment charging conspiracy to distribute five kilograms of cocaine and possessing with intent to distribute four kilograms of cocaine in violation of 21 USC 846 and 841(a)(1).

Wendell Daniels, Odolph Daniels and Frank Renfroe were found guilty by a jury on June 22, 1990. Jason Young pled guilty.

On September 11, 1990 Frank Renfroe was sentenced to prison for 294 months.

2. Trial Evidence. FBI agent Fred Snellings told convicted drug dealer Ed Peavey to contact Wendell Daniels to see if he could get Daniels to sell cocaine to the agent. (II, 14) At trial Wendell Daniels interposed a defense of entrapment.

On December 1, 1989 Wendell Daniels met Agent Snellings and Peavey at a gasoline station and they followed Daniels to his residence on Prevost and sold him 1/2 kilogram of cocaine. After a half-hour of waiting outside a woman arrived in a car, opened the trunk and took out a bag which Daniels nodded for her to hand to Peavey. (III, 19) The bag contained 1/2 kilogram of cocaine. Peavey paid Wendell Daniels $10,000 down and owed him $3,500 on it. (III, 21) From this point on Peavey was out of the plan and Fred Snellings dealt directly with Wendell Daniels. (III, 23)

On December 1, 1989 Frank Renfroe was

not involved in the cocaine transaction. (VI, 62)

Agent Fred Snellings said that Wendell Daniels told him he could get as much cocaine as Snellings needed. (III, 33)

On December 18, 1989 Agent Snellings returned to Detroit to buy cocaine from Wendell Daniels. At the station Snellings met Frank Renfroe. Fred Snellings had no knowledge of Frank Renfroe having a part in the proposed transaction. (III, 37)

Snellings testified that they all talked about cocaine. Snellings said that Frank Renfroe made a telephone call and left the house to go get cocaine. (III, 41,42) Snellings said that approximately one hour later Frank Renfroe returned with no cocaine (III, 56). Snellings testified that Frank Renfroe said he was having someone bring it over. (III, 56)

Subsequently Jason Young and Odolph Daniels came into the house with a bag containing four kilograms of cocaine. (III, 57) Snellings testified that Young handed the unopened bag to Frank Renfroe, Frank Renfroe handed the bag to John Ligato and John Ligato handed the bag containing the money to Frank Renfroe. (III, 59,60) At that point Wendell Daniels, Odolph Daniels, Jason Young and Frank Renfroe were arrested. (III, 71)

3. Defense Testimony. Petitioner testified in his own behalf at trial. Frank Renfroe was not involved in the cocaine transactions described in this trial. He does not sell or buy drugs. (VIII, 118) Frank Renfroe has known Wendell Daniels for many years because Wendell Daniels is involved in fixing racing motorcycles. (VIII, 100) Frank Renfroe is partners in racing motorcycles

with Herman Castle. (VIII, 98) Frank Renfroe often keeps his motorcycle at Weldell Daniels' service garage. (VIII, 118)

Frank Renfroe is on disability and has an income which is 95% of the income he made working for the Ford Motor Company. (VIII, 93)

On December 18, 1989 Frank Renfroe took his son to school and then went to visit Wendell Daniels. (VIII, 107) Wendell Daniels said he was going to the gasoline station with his son Antonio, 2, and Frank Renfroe went along. (VIII, 108) At the gasoline station Wendell Daniels introduced Frank Renfroe to Fred Snellings. (VIII, 108)

On Appeal, the Court of Appeals for the Sixth Circuit affirmed Petitioner's conviction.

REASONS FOR GRANTING THE WRIT

WHERE THERE WAS A GREAT DISPARITY IN THE EVIDENCE AGAINST A CO-DEFENDANT, ANTAGONISTIC DEFENSES AND PROSECUTOR ARGUMENT INVITING CONSIDERATION OF EVIDENCE IRRELEVANT TO PETITIONER, A SEPARATE TRIAL IS REQUIRED.

A. Here and in United States v Swift, 809 F2d 320 (6th Cir 1987) the Sixth Circuit Court of Appeals denied severance because "motions for severance, not reviewed at the close of evidence are deemed waived. " Opinion, 4

Other Circuit Courts of Appeal do not require post evidence motions to sever. Where as here, a pretrial motion to sever is denied and reviewed during trial, the Sixth Circuit rule serves only to bar defendants for technicalities which have no practical effect. Here the trial judge was presented with the severance issue before and during trial.

B. Disparity in the amount of evidence against Frank Renfroe and Wendell Daniels created impermissable spillover. The evidence of Frank Renfroe's presence at the drug transaction of December 18, 1989 was the essence of the government's case against him. The evidence against Wendell Daniels went to the entire period charged in the indictment as well as extensive testimony in regard to drug dealing and concealment of assets remote in time and location from the charges contained in the Indictment.

That the evidence against Frank Renfroe was comparatively slight is a factor to be considered in assessing this issue. Both the disparity in proofs and the jury's ability to compartmentalize evidence are relevant factors. United States v Gaines, 563 F2d 1352 (9th Cir, 1977).

Moreover, the net of the conspiracy

charges in this case restricted Frank Renfroe's cross-examination of Wendell Daniels and Odolph Daniels as to the illegal events outside this indictment that were attributed to Wendell Daniels. See United States v Sampol, 636 F2d 621, 641 (DC Cir, 1980); United States v Bruner, 657 F2d 1278, 1290 (DC Cir, 1981).

C. The prosecutor took unfair advantage of the confusion created by the spillover evidence in his argument to the jury:

> But the fact of the matter is, that these drug deals were so common place, so ordinary to Frank Renfroe, that it didn't matter to him. (IX, 153)

The fact of the matter is there was no evidence of such a course of conduct by Frank Renfroe.

The Sixth Circuit procedural bar ought not withstand the unfair exploitations of this joint trial by the prosecutor.

D. Antagonistic Defenses. Frank Renfroe testified he was not involve in selling cocaine. (VIII, 118)

Although Wendell Daniels admitted he was involved in selling cocaine in the conspiracy charged in this indictment (VIII, p 80) and had made arrangements to have the agents come to Detroit to buy cocaine from him in December 18, 1989, he said that it was Frank Renfroe who obtained the cocaine on that date. (VII, 51,54)

Wendell Daniels' testimony regarding December 18, dovetailed nicely with his brother, Odolph Daniels' story that Frank Renfroe had called Odolph Daniels on December 18 in order to get Odolph Daniels to pass along a message to Jason Young. Odolph Daniels said that the message to Jason Young was to order "four." Odolph testified he did not know what the "four"

were but that was his excuse for showing up with Jason Young and the cocaine. (VI, 119,123)

In effect Frank Renfroe faced three prosecutors. The effect of this testimony was that the Daniels brothers testified to save themselves at the expense of Frank Renfroe. They said "yes, there was a cocaine deal on December 18" but no, me and my brother were not involved in it, so, it must be Jason Young and Frank Renfroe.

The commentary accompanying the American Bar Association Standards Relating to Joinder and Severance states:

> It has long been the view that defendants joined for trial should be granted a severance whenever their defenses are antagonistic to each other. ABA Project on Minimum Standards for Criminal Justice, Standards Relating to Joinder and Severance, Approved Draft, 1968, Sec 2, 3(b) commentary, 40-41

Sixth Circuit procedural and substantive rulings on severance are at variance with

the case law in other circuits. In this case the procedural bar of United States v Swift, supra, creates an unfair windfall to the prosecution.

This is an important issue of federal law which should be settled by this Court.

II

WHERE THE FBI AGENT WHO MADE THE BUY ALLEGED IN THIS CASE WAS ALLOWED TO GIVE HIS OPINION ON GUILT AS WELL AS LENGTHY CONCLUSIONS ABOUT THE MEANING OF EVIDENCE A NEW TRIAL IS REQUIRED.

The FBI agent who made the undercover cocaine buys alleged in this case was also allowed to testify as to substance of tape recorded telephone conversations herein. He testified as to the meaning of "coded" words as to drugs (II, 181), money (II, 19), "normal" methodology of drug deals (II, 20), that the audio tapes were accurate (II, 21), identification of Wendell Daniels and Frank Renfroe's voices (II, 22,23) and also as to what was meant by each indivi

dual speaking in the conversations. (II, 33; III, 10)

The agent's testimony comprised 237 pages of transcript. He was the main fact witness; he was also used as an expert witness.

The Court of Appeals held that "the admission of expert testimony by a law enforcement officer is a matter within the broad discretion of the trial judge and we will sustain admission of such testimony unless it was manifestly erroneous.

A. Confusion Between Fact and Opinion Testimony.

> However, there is something rather offensive in allowing an investigating officer to testify not simply that a certain pattern of conduct is often found in narcotics cases, leaving it for the jury to determine whether the defendant's conduct fits the pattern, but also that such conduct fitted that pattern, at least when other inferences could have been drawn not unreasonably although perhaps not as reasonable as that to which the expert testified. United States v Brown, 776 F2d 397 (2nd Cir, 1985)

Here Fred Snellings was the man on the street. Frank Renfroe's testimony was that he did not participate in the drug transaction charged herein. Fred Snellings, as the man on the street, testified that Frank Renfroe was involved in the drug deal.

B. Interpretation and Opinion Testimony. Fred Snellings also testified as to what was understood in conversations:

> Q. And did it seem to both of you, understood what you were saying to one another, even though you might not have used the words kilos or kilograms of cocaine?
>
> ****
>
> Q. What is meant by contacting our people?
>
> A. Apparently, Frank Renfroe and Wendell Daniels, had other people they were getting money for, that they're going to sell the narcotics to[.]
>
> ****
>
> A. Yes, we understood each other. (II, 45)
>
> ****

> Q. And did there appear to be an understanding between you or did the defendant say wait, what are you talking about, 24 cents certainly isn't enough to buy an engine or motor for a car?
>
> A. The defendant knew exactly. (III, 32)

The rules of evidence do not support the uncontrolled testimony offered in this case; Rule 704(b) provides:

> No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or a defense thereto. Such ultimate issues are matters for the trier of fact alone.

Even though the testimony is not barred by FRE 704(b), district judges should heed the Advisory Committee's Note to Rule 704:

> The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely

> tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day.

C. An Additional Summary to the Jury Via Testimony of the First Witness. Fred Snellings lengthy uncontrolled testimony had the effect of allowing the prosecution to argue their case to the jury in the testimony of the first witness:

> [u]ncontrolled use of expert testimony may have the effect of providing the government with an additional summation by having the expert interpret the evidence. United States v Mang Sun Wong, 884 F2d 1537 (2nd Cir, 1989)

According to Snellings he made a hand to hand buy. His "expert" testimony was to prejudice the jury with argument in the guise of testimony. The prosecutor chose this path, the conviction should not stand.

The lengthy testimony of the agent as the primary fact witness as well as the prosecution's expert on drug organizations created a confusion between fact and opinion testimony. The Federal Rules of

Evidence and case law in other circuits prohibit such an encroachment on a fair trial. US Const Am V. This is an important issue of federal law which should be settled by this Court.

III

WHERE THE PROSECUTOR'S IMPROPER COMMENTS DISPARAGED THE DEFENSE AND DEPICTED DEFENDANT AS A BAD MAN, DEFENDANT'S RIGHT TO A FAIR TRIAL AND DUE PROCESS OF LAW WERE VIOLATED.

In United States v Young, 470 US 1 (1985) certiorari was granted to review a prosecutor's admonition to the jury to "do its job" and whether or not it was "plain error." The court said "the kind of advocacy shown by this record has no place in the administration of justice and should neither be permitted nor rewarded[.] Id., at 9. Here, unlike Young, there is no invited response to defense comments and the prosecutor's improper arguments cover a wide spectrum.

The remarks include improper comment on religion, specter of violence, support the war on drugs and disparaging the defense and defense counsel.

Comment on Religion. In his opening statement the prosecutor improperly injected an inference that defendants were not religious people:

> Also, there's going to be testimony in there that is not used in everyday language, that people who come from religious backgrounds or things of that nature would not use that type of language in everyday conversation. It's very colorful words, basically curse words used quite frequently within the conversation. And I don't want any of you to be offended by it, but I want you to realize that it has its place in this case. (I, 4,5)

It is clear that the prosecutor could not cross-examine defendants as to religious beliefs. The effect here is the same.

The comment had nothing to do with the prosecutor's proofs in the case. It was an improper opening statement; it was an improper comment.

Injection of Violence. Civic Duty Argument. In arguing an objection regarding the "confidential" informant (Ed Peavey) in this case the prosecutor improperly editorialized as follows:

> It's been clear, regardless of whether or not defense counsel thinks or did in fact identify the confidential source in their own mind, that the Government is not required to turn over in open court the confidential source. That would destroy the whole policy of making the confidential source confidential. You would place him clearly in danger of retribution. It would create problems, the sources would dry up if they knew their names were going to be revealed in court. (III, 108)

There was no evidence of guns or violence in this case. The comment was improper:

> Reversal is required because the prosecutor intentionally and for no proper purpose injected into the trial the specter of organized crime and the Mafia. United States v Love, 534 F2d 87 (6th Cir, 1976)

The "dry up" argument implied that the defense identification of this transformed drug dealer would effect the war on drugs.

The identity of the "confidential" informant in this case was no secret; it was Ed Peavey, a drug dealer. The "dry up" argument was improper.

Disparaging the Defense and Defense Counsel. In his rebuttal argument to the jury the prosecutor argued that defense counsel was "very sharp" and that counsel focused on "irrelevancies":

> What about Frank Renfroe's case. In his closing argument defense counsel for Mr. Renfroe was very sharp. In fact I give him credit for the way he has run this case. What he did was he picked out every irrelevant matter that went on during the course of the trial and focused on the irrelevancies. He spent at least ten minutes of his closing argument telling you th at the evidence established that Frank Renfroe's nickname was not Shorty.
>
> What other irrelevancy did defense counsel for Mr. Renfroe raise. (IX, 150,151)

The words are presented in a manner to disparage defense counsel and the theory of the defense:

> The prosecutor may not question defense counsel's veracity. People v Bairefoot, 117 Mich App 225, 230; 323 NW2d 302 (1982); Adams v State, 192 So 2d 762 (Fla, 1966); Jackson v State, 41 So 2d 15 (Fla App, 1982). See also People v Hill, 258 Mich 79, 88; 241 NW 873 (1932). When the prosecutor argues that the defense counsel himself is intentionally trying to mislead the jury, he is in effect stating that defense counsel does not believe his own client. This argument undermines the defendant's presumption of innocence. Commonwealth v Long, 258 PA Supper 312; 392 A2d 810 (1978). Such an argument impermissibly shifts the focus from the evidence itself to the defense counsel's personality. People v Wise, 134 Mich App 82 (1984)

An Assistant United States Attorney purports to represent the People of the United States, and thus carries a special aura of legitimacy about him. United States v Bess, 593 F2d 749 (6th Cir, 1979). In United States v Wallace, 848 F2d 1464 (9th Cir, 1988), the court found cumulative error due to prosecutorial errors:

> Although each of the above errors, looked at separately, may not rise to the level of reversible error, their cumulative effect may nevertheless be so prejudicial to the appellants that reversal is warranted.

Plain Error. There was no objection to the foregoing evidence. The effect of the prosecutorial comments herein was to disparage the defense and to impermissibly suggest that Frank Renfroe is a bad man.

Frank Renfroe testified in his own behalf that he was present at the December 18, 1989 drug transaction, but took no part in it. The improper comments had no place in the record as they raised irrelevant and prejudicial evidence before the jury.

This is an important issue of federal law which should be settled by this Court.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Dated: March 17, 1992

APPENDIX A

OPINION

(United States Court of Appeals
for the Sixth Circuit)

(Filed December 26, 1991
Leonard Green, Clerk)

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

SIXTH CIRCUIT RULE 24 LIMITS CITATION TO SPECIFIC SITUATIONS. PLEASE SEE RULE 24 BEFORE CITING IN A PROCEEDING IN A COURT IN THE SIXTH CIRCUIT. IF CITED A COPY MUST BE SERVED ON OTHER PARTIES AND THE COURT. THIS NOTICE IS TO BE PROMINENTLY DISPLAYED IF THS DECISION IS REPRODUCED.

(UNITED STATES OF AMERICA, **Plaintiff-Appellee**, v. ODOLPH DANIELS, WENDELL B. DANIELS, and FRANK RENFROE, **Defendants-Appellants --- ON APPEAL** FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN -- **Nos. 90-1986, 90-1987, 90-2018**)

BEFORE: MARTIN and **MILBURN**, Circuit Judges; and **CONTIE**, Senior Circuit Judge.

PER CURIAM. NOT FOR PUBLICATION

On June 22, 1990, a jury convicted Odolph Daniels, Wendell Daniels, and Frank Renfroe of conspiracy to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §846, and possession of

cocaine with intent to distribute, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. In addition, the jury convicted Wendell Daniels for distribution of cocaine.

The defendants raise numerous issues on appeal. Odolph Daniels and Frank Renfroe assert the district court abused its discretion by denying their motions for severance. Frank Renfroe asserts the district court abused its discretion by allowing an undercover agent to testify as an expert on coded drug terminology the agent and the defendants used during the transaction. Renfroe also asserts improper comments by the prosecutor violated his right to a fair trial and due process of law. Wendell Daniels asserts the district court abused its discretion in denying his motion for disclosure of the confidential informant and in allowing into evidence his

1988 claim to $80,000 dollars forfeited as drug money. All three defendants contest the district court's Federal Sentencing Guidelines calculations. We affirm the convictions but remand for resentencing with respect to two issues as described below.

Starting in September of 1989, an informant allowed FBI agents in Cleveland to monitor cocaine negotiations between himself and Wendell Daniels. The conversations resulted in a meeting on December 1, 1989, between the informant and Wendell Daniels in Daniels' Detroit, Michigan, residence. Undercover FBI agent Frederick Snellings drove the informant from Cleveland to the meeting in Detroit and waited in the car while Daniels sold the informant one-half kilogram of ocaine for $13,500. After the transaction, the informant introduced agent Snellings to

Daniels as his friend "Teddy." Two weeks later on December 15, 1989, agent Snellings contacted Wendell Daniels and told him that he would deliver the balance of the money owed for the December 1, 1989, transaction and that he would like to purchase more cocaine, this time independent of the informant. Attempts to arrange a five kilogram transaction failed because the agents could not secure enough funds. However, after further negotiations, Snellings agreed to purchase four kilograms. Wendell Daniels promised the agents that a fifth kilogram would be available if they could come up with more money.

On December 18, Snellings returned to Detroit with FBI special agent John Ligato where they met Wendell Daniels and Frank Renfroe at a Mobil gas station near Daniels' home. Daniels and Renfroe were accompanied by Renfroe's eleven year old

son, DeAndre. Snellings and Ligato then followed Daniels and Renfroe to Daniels' residence. There, Renfroe called Wendell's brother Odolph and told him to contact Jason Young and have him deliver four kilograms of cocaine. Renfroe also directed Wendell Daniels to count the $100,000 dollars Ligato had in a gym bag. Snellings testified at trial that while waiting for the cocaine to arrive, Wendel Daniels spoke of cocaine sales he had made in Cleveland, Alabama, and Florida. In the meantime, Odolph had called Jason Young and asked for the cocaine. Young drove to Odolph Daniels' home and together Odolph and Young drove with the cocaine to Wendell's home. Upon arrival, Young carried the four kilograms of cocaine into Wendell's house. Odolph accompanied him inside and, after a minute or so, Odolph left the house and waited outside on the front lawn. After

Renfroe, Young, Wendell Daniels and Odolph Daniels were arrested, the agents found another kilogram of cocaine inside a briefcase in the car driven by Young. Young admitted to owning the briefcase.

On January 4, 1990, a grand jury indicted Odolph Daniels, Wendell Daniels, and Frank Renfroe for conspiracy to distribute five kilograms or more of cocaine, in violation of 21 U.S.C. §846, and possession of cocaine with intent to distribute, in violation of 21 U.S.C. §841(a)(1) and 18 U.S.C. §2. In addition, the grand jury indicted Wendell Daniels for distribution of cocaine. The jury trial for Wendell Daniels, Odolph Daniels, and Frank Renfroe began on June 11, 1990. Each of the defendants testified during the trial. Wendell Daniels claimed entrapment and Odolph Daniels and Frank Renfroe claimed that they were unaware a drug transaction was taking place.

On June 22, 1990, the jury convicted the defendants as charged. The district court sentenced Wendell Daniels to 25 years in prison; Renfroe to 24 and a half years in prison; and Odolph Daniels to 15 years and 8 months in prison.

Both Odolph Daniels and Frank Renfroe assert the district court abused its discretion by denying their motions for severance. They each argue that the considerable evidence the United States had against Wendell Daniels resulted in prejudicial "spill-over" into the cases against them. Their motions for severance were not renewed following the completion of evidence, however. Both also argue Wendell Daniels' claim of entrapment created antagonistic defenses amongst the defendants resulting in prejudicial effects at trial, including the introduction of Wendell's 1988 claim to $80,000 dollars of alleged drug money found

in a car in which Odolph was a passenger.

As a general rule, persons jointly indicted should be tried together. United States v Causey, 834 F2d 1277, 1287 (6th Cir. 1987), cert. denied, 486 U.S. 1034 (1988). We will not disturb a district court's denial of a motion for severance unless there was an abuse of discretion. United States v Gallo, 763 F2d 1504, 1525 (6th Cir. 1985), cert. denied sub nom. Graewe v United States, 474 U.S. 1069 (1986). A great disparity of evidence alone will not serve as a basis for severance. United States v Thomas, 728 F2d 313, 319 (6th Cir. 1984). A defendant can prove abuse only by making a strong showing of prejudice. Gallo, 763 F2d at 1525. "Specifically, he must show an inability by the jury to separate and to treat distinctively evidence that is relevant to each particular defendant on trial." Id.

Without a clear showing of specific and compelling prejudice resulting from a joint trial, the denial of a motion for severance will not be a basis for reversal. Id. at 1526. Even if some potential jury confusion is established, "this must be balanced against society's need for speedy and efficient trials." Id. at 1525. Lastly, we note our decision in United States v Swift, 809 F2d 320 (6th Cir. 1987). In Swift, we ruled that motions for severance, not renewed at the close of evidence, are deemed waived. Id. at 323.

This court has recognized that there is always a danger a jury will convict on the basis of cumulative evidence, rather than evidence relating to each defendant, but "[t]he jury must be presumed capable of sorting out the evidence and considering the case of each defendant separately." Causey, 834 F2d at 1288 (quoting United

States v Warner, 690 F2d 545, 553 (6th Cir. 1982). Renfroe and Odolph Daniels have not overcome this presumption. Both defendants cite the strong evidence against Wendell Daniels. However, neither has shown any indication of prejudice that would merit a new trial. Only three defendants were tried in this case. The facts involved only two cocaine transactions. With respect to Wendell's 1988 claim to the $80,000 forfeited as drug proceeds, the judge gave limiting instructions three times. This case is not one of such complexity that the jury was unable to separate the evidence with respect to each defendant. Further, we observe the defendants failed to renew their severance motions at the close of evidence, resulting in the waiver of their severance requests. Swift, 809 F2d at 323.

The district court did not abuse its discretion, as Renfroe argues, by allowing undercover agent Fredrick Snellings to testify as an expert on coded drug terminology the agent and the defendants used during the transaction. The admission of expert testimony by a law enforcement officer is a matter within the broad discretion of the trial judge and we will sustain admission of such testimony unless it was manifestly erroneous. United States v Pearce, 912 F2d 159, 163 (6th Cir. 1990), cert. denied sub nom. Thorpe v United States, 111 S.Ct. 978 (1991). Other circuits have ruled that it is not impropr to permit a law enforcement officer to give expert testimony when such testimony will assist the jury. See. e.g., United States v Hoffman, 832 F2d 1299 (1st Cir. 1987)(DEA agent permitted to "decode" drug negotiations in intercepted phone call).

We note as well that almost all taped conversations decoded by Snellings occurred solely between Wendell Daniels and the informant; only one call contained Renfroe's voice. This furthers our belief that the district court did not abuse its discretion by allowing Snellings to testify as an expert on coded drug testimony with respect to Renfroe.

Renfroe also asserts improper comments by the prosecutor violated his right to a fair trial and due process of law. Because Renfroe did not object at trial to any of the prosecutor's comments he cites on appeal, this court reviews only for plain error. United States v Causey, 834 F2d 1277, 1281 (6th Cir. 1987), cert. denied, 486 U.S. 1034 (1988). Plain errors must have been apparent to the trial judge without objection, striking at the fundamental fairness, honesty, or public

reputation of the trial. Id. Even if prosecutorial misconduct is found, in order for it to serve as the basis for a new trial it must be so "pronounced and persistent that it permeates the entire atmosphere of the trial" United States v Krebs, 788 F2d 1166, 1177 (6th Cir.) (quoting United States v Blevins, 555 F2d 1236, 1240 (5th Cir. 1977), cert. denied, 434 U.S. 1016 (1978)) cert. denied, 479 U.S. 930 (1986). None of the six comments Renfroe refers to by the prosecutor strike at the fundamental fairness of the trial. The separate com ments occurred during the period of a two-week trial. Given the nature of the comments, the length of the case, and the substantial evidence against Renfroe, we do not believe the comments serve as the basis for a new trial.

Wendell Daniels asserts the district court abused its discretion in denying his

pre-trial motion for disclosure of the confidential informant. Daniels claims the disclosure and production of the informant was necesary to support his entrapment defense Although Daniels knew the name of the government's informant and that he was from Cleveland, the only affirmative action Daniels took to obtain the informant for trial was to move for disclosure. Daniels failed to pursue the informant in any other manner. Because Daniels knew the name and hometown of the informant, we believe that Daniels could have solved his problems with a subpoena; thus, we conclude that the district court did not err in denying his motion.

Wendell Daniels also asserts the district court abused its discretion in allowing into evidence a claim he made in 1988 to $80,000 dollars, which police had seized as drug money. In his cross-

examination, Daniels admitted claiming ownership of the money which was found hidden in a car that police stopped for a traffic violation. At trial, however, Daniels claimed that the money was not his and that he had no idea where it came from. Daniels now argues that this evidence was both irrelevant and prejudicial. The United States responds that Daniels' 1988 claim to the money was relevant to his entrapment defense because it showed predisposition and intent as well as substantiated Agent Snellings' testimony concerning Daniels' assertions of previous drug dealings.

Rule 404(b) authorizes the admission of "similar act evidence" unless the evidence is offered to prove character. The district Court has broad discretion in making 404(b) evidentiary rulings. United States v Ebens, 800 F2d 1422, 1433 (6th Cir. 1986). Daniels made relevant his predis-

position to commit crimes by asserting entrapment. Thus, the district court did not abuse it's discretion in allowing into evidence Daniels' 1988 claim to the money that police had seized a drug proceeds.

Each of the defendants raises certain questions regarding the Federal Sentencing Guidelines. These Guidelines issues will be resolved in several upcoming en banc hearings. For example, the en banc hearing in United Sates v Gessa, 90-5825/5903 (6th Cir. Aug. 29, 1991), reh'g en banc granted, _____, will directly touch upon all three defendant's claims that the quantity of cocaine for which they were sentenced was improperly calculated. At this stage of the proceedings, the parties may await the determinations of the en banc court with regard to the applicable Guideline issues. Therefore, this case is remanded to the district court for reconsideration of the

defendants' sentences based upon the upcoming en banc decisions. To ensure, however, that the posture of this proceeding remains so that the defendants may continue to raise their sentencing claims, the instant cases will remain in a status of nonactivity until the en banc decisions are rendered.

Thus, we affirm the judgment of the district court on all issues contained in this opinion except the sentencing guideline issues which are remanded as noted.

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(2)

No. 91-1636

In the Supreme Court of the United States

OCTOBER TERM, 1991

FRANK RENFROE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion by denying petitioner's motion for a severance on the grounds of disparity of evidence and antagonistic defenses.

2. Whether the district court abused its discretion by allowing a DEA agent to testify as an expert witness.

3. Whether remarks by the prosecutor during trial constituted plain error and deprived petitioner of a fair trial.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A17) is unreported, but the judgment is noted at 951 F.2d 350 (Table).

JURISDICTION

The judgment of the court of appeals was entered on December 26, 1991. The petition for a writ of certiorari was filed on March 23, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted, together with Odolph Daniels and Wendell Daniels, on charges of conspiracy to possess cocaine with intent to distribute it, in violation of 21 U.S.C. 846, and possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). Wendell Daniels was also convicted of distribution of cocaine. Petitioner was sentenced to 294 months' imprisonment, to be followed by a five-year term of supervised release. The court of appeals affirmed. Pet. App. A1-A17.

1. On December 1, 1989, Wendell Daniels sold an FBI informant one-half kilogram of cocaine for $13,500 at Daniels' home in Detroit, Michigan. After the transaction, the informant introduced FBI agent Frederick Snellings to Daniels as his friend "Teddy." On December 15, 1989, Snellings told Daniels that he would deliver the balance of the money owed on the December 1 sale and that he would like to purchase more cocaine, this time without the informant's participation. After further negotiations, Snellings agreed to purchase four kilograms of cocaine. Pet. App. A3-A4.

On December 18, Snellings and another agent met Wendell Daniels and petitioner near Daniels' home. The agents then followed Daniels and petitioner to Daniels' residence. There, petitioner called Wendell Daniels' brother Odolph Daniels and told him to have Jason Young deliver four kilograms of cocaine. Petitioner also directed Wendell Daniels to count the $100,000 that the agents had brought. After Odolph Daniels called Young, the two brought the cocaine to Wendell Daniels' home. The agents then arrested petitioner, Young, Wendell Daniels, and Odolph Daniels; they found another

kilogram of cocaine inside a briefcase in Young's car. Pet. App. A4-A6.

2. Prior to trial, petitioner and Odolph Daniels moved for severance of their trial from that of Wendell Daniels. They claimed that the overwhelming evidence against Wendell Daniels would spill over and impermissibly prejudice them. They also argued that their defenses were antagonistic to that of Wendell Daniels. The district court denied the motions, finding that Daniels and petitioner had not shown any risk of compelling prejudice from the joint trial. Gov't C.A. Br. 5.

At trial, each of the three defendants testified. Wendell Daniels claimed entrapment, while Odolph Daniels and petitioner claimed that they were unaware that a drug transaction was taking place.

3. On appeal, petitioner argued that the possibility of spillover and conflicting defenses required a severance. The court of appeals held that the district court did not abuse its discretion in denying the severance. It stated that "[a] great disparity of evidence alone will not serve as a basis of severance." Pet. App. A8. To mandate severance due to evidentiary disparity, the court explained, a defendant "must show an inability by the jury to separate and to treat distinctively evidence that is relevant to each particular defendant on trial." *Ibid.* The court further observed that "[t]he jury must be presumed capable of sorting out the evidence and considering the case of each defendant separately." Pet. App. A9.

The court of appeals held that petitioner and Odolph Daniels had failed to overcome that presumption. It acknowledged the greater amount of evidence against Wendell Daniels, but it held that under the circumstances of this case, petitioner and Odolph Daniels were not subjected to unfair prejudice as a result of the disparity. The court noted that the case was a simple one, involving only three defendants and only two cocaine transactions.

It was therefore unlikely that the jury would be "unable to separate the evidence with respect to each defendant." Pet. App. A10. In addition, the court noted that, under the rule of *United States* v. *Swift*, 809 F.2d 320, 323 (6th Cir. 1987), the defendants' failure to renew the severance motions at the close of the evidence resulted in a waiver of those motions.

The court of appeals also rejected the claim that the district court had abused its discretion by admitting Snellings' expert testimony, and it rejected petitioner's claims of prosecutorial misconduct. Pet. App. A11-A12.

ARGUMENT

1. Petitioner renews his contention (Pet. 7-12) that the district court abused its discretion by trying him together with Wendell Daniels. Petitioner argues that he was entitled to a severance on two grounds: the disparity in the strength of the evidence against himself and against Wendell Daniels; and the antagonism between his defense and that of Wendell Daniels.[1]

It is well settled that persons who are indicted together generally should be tried together. See, *e.g.*, *United States* v. *Warner*, 955 F.2d 441 (6th Cir. 1992); *United States* v. *Tootick*, 952 F.2d 1078 (9th Cir. 1991); *United States* v. *Romanello*, 726 F.2d 173, 177 (5th Cir. 1984). Rule 14, Fed. R. Crim. P., however, authorizes district courts to sever the trial if a joint trial will prejudice the defendant. The courts of appeals review determinations concerning severance for an abuse of

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[1] Petitioner argues that the Sixth Circuit's rule, which requires severance motions to be renewed at the close of the evidence, conflicts with the rule in other circuits. That issue is not appropriate for review, because waiver served as only an alternative ground for the court's decision. Before addressing the waiver issue, the court of appeals found that petitioner had failed to show that he would be prejudiced by a joint trial.

discretion. See, *e.g.*, *Romanello*, 726 F.2d at 177; *United States* v. *Davis*, 623 F.2d 188, 194 (1st Cir. 1980).

The disparity in the amount of evidence against petitioner and Wendell Daniels did not require that petitioner be granted a severance. Differences in the amount of evidence against different defendants do not require a severance unless there is a risk of prejudice from the spillover of evidence from one defendant to another. See, *e.g.*, *United States* v. *Kindle*, 925 F.2d 272, 277 (8th Cir. 1991); *United States* v. *Hernandez*, 921 F.2d 1569 (11th Cir.), cert. denied, 111 S. Ct. 2271 (1991). If the jury can compartmentalize the evidence respecting the various co-defendants, evidentiary disparity does not require a severance. Here, the facts of the case were not complicated, and only three defendants were on trial. Because there was no reason the jury could not weigh the evidence against each defendant separately, the district court did not abuse its discretion by denying a severance.

As to petitioner's argument that the antagonism between his defense and that of Wendell Daniels required a severance, this Court has granted certiorari in *Zafiro* v. *United States*, No. 91-6824, which raises the question whether the presentation of antagonistic defenses entitles criminal defendants to separate trials. The Seventh Circuit in *Zafiro* affirmed the denial of a severance to two pairs of defendants who asserted antagonistic defenses. The court noted that many cases have stated that a defendant is entitled to a severance when the defendants present antagonistic defenses such that the acceptance of one party's defense would lead the jury to conclude that the other party is guilty. *United States* v. *Zafiro*, 945 F.2d 881, 885 (7th Cir. 1991). The court refused to adopt that standard. It explained that "[t]he fact that it is certain that a crime was committed by one of two defendants is a reason for trying them together, rather than a reason against, to avoid 'the scandal and

inequity of inconsistent verdicts.'" *Ibid.* (quoting *Richardson* v. *Marsh*, 481 U.S. 200, 210 (1987)). The court concluded that "persons charged in connection with the same crime should be tried separately only if there is a serious risk that a joint trial would prevent the jury from making a reliable judgment about the guilt or innocence of one or more of the defendants." 945 F.2d at 885.[2] That issue, the court reasoned, should rarely be determined by reference to the existence of antagonistic defenses; rather "[i]f it is indeed certain that one and only one of a group of defendants is guilty, the entire group should be tried together, since in separate trials all might be acquitted or all convicted—and in either case there would be a miscarriage of justice." 945 F.2d at 886.

In this case, the court of appeals did not directly address the question whether antagonistic defenses require a severance. It discussed instead the ability of the jury independently to decide the guilt of each defendant. Moreover, Daniels' defense of entrapment was not necessarily inconsistent with petitioner's defense of lack of knowledge. The jury could have believed that Wendell Daniels was entrapped and that petitioner was an unwitting participant in the resulting drug transaction. Thus, even if this Court concludes in *Zafiro* that defendants who present antagonistic defenses are entitled to a severance, the result in this case would not necessarily be

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[2] The court offered two examples of such a case. First, in "a *complex* case with *many* defendants some of whom might be only *peripherally* involved in the alleged wrongdoing," severance may be required because "the bit players may not be able to differentiate themselves in the jurors' minds from the stars." 945 F.2d at 885. Second, severance may be warranted "where exculpatory evidence essential to a defendant's case will be unavailable—or highly prejudicial evidence unavoidable—if he is tried with another defendant." 945 F.2d at 886.

affected. Nonetheless, because both this case and *Zafiro* involve the extent to which antagonistic defenses require a severance under Rule 14, it is possible that the Court's decision in *Zafiro* may affect the disposition of this case. The Court therefore may wish to hold this petition pending its decision in *Zafiro*.

2. Petitioner contends (Pet. 12-17) that the district court abused its discretion by permitting FBI agent Snellings to testify as an expert with regard to drug-related expressions in the tape-recorded conversations that were played for the jury. Agent Snellings, who had conducted 50 to 100 undercover narcotics investigations and had attended FBI training school to study types of drugs, street language of the drug trade, and undercover narcotics work, testified in part as an expert pursuant to Fed. R. Evid. 702 and was permitted to decipher the drug-related language in the recorded conversations.[3] The recorded conversations contained a great deal of street language and coded drug terms, such as "yellow stuff," which Snellings said referred to heavily cut cocaine, and "knock[ing] a nickel off," which Snellings interpreted to mean reducing the price by $5,000. Petitioner did not object to the admission of any of Agent Snellings' expert testimony. Gov't C.A. Br. 15-17. The district court also gave defense counsel wide latitude in cross-examining Snellings and instructed the jury that it was free to accept or reject his testimony.

Expert testimony about the meaning of street language and coded expressions in drug cases is often

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[3] Rule 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

helpful to a jury. "Lay jurors cannot be expected to be familiar with the lexicon of the cocaine community." *United States* v. *Hoffman*, 832 F.2d 1299, 1310 (1st Cir. 1987); accord *United States* v. *Brown*, 776 F.2d 397 (2d Cir. 1985), cert. denied, 475 U.S. 1141 (1986). Nor was it improper, as petitioner contends (Pet 12-13), for the district court to permit Snellings to testify that the defendants appeared to understand particular conversations. Snellings observed the demeanor of those to whom he spoke and could testify as a fact witness about it. There was nothing improper in permitting Snellings to give both fact evidence and expert testimony. See *Brown*, 776 F.2d at 400. Petitioner's contention that the length of Snellings' testimony—over 200 transcript pages—rendered it inadmissible is plainly without merit.

3. Petitioner further contends (Pet. 17-22) that alleged instances of misconduct in the prosecutor's opening statement and closing arguments require reversal of his conviction. The court below properly found no plain error in any of the challenged remarks.

We submit that each of the prosecutor's comments about which petitioner now complains was proper. Even if the comments were improper, however, they certainly did not constitute plain error, which petitioner concedes is the applicable standard, see Pet. 22.

First, the prosecutor's reference to religion in his opening statement (I Tr. 4-5) was merely a factual statement to the jury, warning the jurors to expect curse words on the tape recordings to be introduced at trial. The prosecutor tempered the comments by reminding the jurors not to take offense at the language. Second, the comment in closing argument concerning the policy of maintaining the confidentiality of informants (III Tr. 108) simply explained the reason for the policy generally. The prosecutor never suggested that the defendants on trial might harm the informant. Rather, he

remarked that the government was attempting to maintain the trust of all informants by strictly maintaining confidentiality. Third, the comment in rebuttal argument on defense tactics (IX Tr. 150-151) was a permissible discussion of the focus of petitioner's argument, which was an entirely appropriate introduction to the prosecutor's effort to rebut that argument. Thus, the comments at issue were not erroneous at all, much less plain error resulting in a miscarriage of justice.

CONCLUSION

With respect to the first question presented, the petition for a writ of certiorari should be held pending the disposition of *United States* v. *Zafiro*, No. 91-6824. In all other respects, the petition should be denied.

Respectfully submitted.

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